(12)

No. 96-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HON. THOMAS R. PHILLIPS, *et al.*,
Petitioners,

v.

WASHINGTON LEGAL FOUNDATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS AND LEGAL COUNSEL FOR THE ELDERLY AS AMICI CURIAE URGING REVERSAL OF THE JUDGMENT BELOW

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INTEREST OF AMICI CURIAE[1]

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 30 million persons aged fifty and older that is dedicated to addressing the needs and interests of older Americans. In representing the interests of its members, and to promote the social welfare, AARP seeks: (a) to enhance the quality of life for individuals as they grow older; (b) to promote independence, dignity, and purpose for individuals as they grow older; and (c) to improve the image of aging.

Older persons are substantial consumers of legal services. Two federal public programs augment private attorney services and help supply needed assistance. The Older Americans Act (OAA) offers grants-in-aid to the states to provide services and advocacy to older persons. One advocacy component is Title III legal services. According to an Administration on Aging Report, Title III legal services programs delivered 1.4 million hours of legal assistance in 1995. Unlike Title III, the Legal Services Corporation (LSC) funds needs-based programs for low-income persons irrespective of their ages. The debate over public funding of Title III and LSC programs is ongoing, but even the harshest critics cannot deny that Title III and LSC programs have assisted many thousands of older persons with their legal problems over the years.

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[1] In compliance with Rule 37.6 of this Court, amici curiae, AARP and LCE, state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than these amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk.

In recognition of the significant need of the older population for legal services, and cognizant that, as a practical matter, low-income older persons have nowhere else to turn for legal assistance, AARP has consistently supported both the Title III and LSC programs. Both of these federally funded legal assistance programs also receive Interest On Lawyers Trust Accounts (IOLTA) funds. AARP also advocates for adequate funding and support for legal assistance programs at the state level.

There is no reason to believe that older persons' needs for legal assistance will diminish in the years ahead. The numbers of persons 60 years of age and older are growing and the percentage of older persons in the total population is increasing as well. Because legal assistance is necessary when planning one's personal affairs, and is often required to obtain basic necessities such as health care, in-home support services, protective services, and benefits from programs such as Social Security, Supplemental Security Income (SSI), and Medicare, the need for legal services will rise along with the population increase. As the leading organization for older persons in this country, AARP has considerable interest in ensuring that older persons' needs for legal assistance are met. AARP files this brief in support of Petitioners because IOLTA programs have played a vital role in filling gaps in serving the need of older persons for legal assistance.

The other *amicus*, Legal Counsel for the Elderly, Inc. (LCE), is a non-profit organization incorporated in the District of Columbia, which is sponsored by the AARP Foundation and AARP. It is dedicated to providing legal services to low and moderate income older persons in the District of Columbia by training and educating others concerning the legal rights of older persons, and by testing methods of providing free and low cost legal and advocacy

services to older persons. LCE yearly provides free and reduced fee legal services to over 7,000 residents of the District of Columbia, including residents of nursing homes and group homes.

LCE receives funding from a variety of sources including the District of Columbia Bar Foundation. The D. C. Bar Foundation is an organization that receives most of its funds through the IOLTA program established by order of the District of Columbia Court of Appeals, the District's highest court, in the exercise of its supervisory authority over the District of Columbia Bar. LCE has been a grant recipient of the D. C. Bar Foundation since its inception. LCE utilizes funds received from the D. C. Bar Foundation to provide low-income older people with legal assistance in the areas of protective services, guardianships, conservatorships, powers of attorney, and related matters for persons with diminished capacity. LCE is also involved on an ongoing basis with many other legal service providers, and LCE coordinates its activities and shares expertise with such legal services providers locally and nationally that also receive significant funding from IOLTA programs. Thus, LCE has a direct interest in this matter because of its funding and that of the organizations with which it collaborates.

SUMMARY OF ARGUMENT

The decision by a panel of the court below strikes down the innovative IOLTA program -- a program developed by the bench and bar to fund legal services for the poor -- which has previously been upheld by all of the courts, both federal and state, that have considered the IOLTA program.

The panel below did so on the premise that interest follows principal. However, in so doing, the panel failed to appreciate the reality that here there is no interest to follow principal and also failed to follow the law of Texas to that effect as declared by the Texas Supreme Court. In addition, the panel decision failed to conduct the analysis required by this Court's taking clause jurisprudence, and misapplied this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

Properly understood, the IOLTA programs do not create any property interests in individual clients, and even if property interests are indirectly created by the pooled IOLTA accounts, there is no taking under the analysis required by *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978), and subsequent cases.

The conclusion that there is no property and no taking leaves no basis for Respondents' other claims: (1) that Respondents are deprived of the right to exclude others from benefiting from their property,[2] and (2) that their First

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[2] *See* Respondents' Memorandum in Response to the Petition at p. 5, n. 2.

Amendment rights are violated. These claims were not passed on below nor presented by the petition. They should, nevertheless, be considered and rejected by this Court under the jurisprudential standards governing Rule 14.1(a) of this Court, as explained in *Yee v. City of Escondido*, 503 U.S. 519, 533-38 (1992).

This case meets the two-prong test of *Yee*. First, this is a "most exceptional" case because it involves the validity of IOLTA, a matter of great importance to our justice system. Endorsed by the Conference of Chief Justices and the American Bar Association, IOLTA programs have been adopted in every state and the District of Columbia, usually by order of the highest court of the jurisdiction, to provide much needed funds to meet the legal needs of the poor. The need for IOLTA continues to grow as public funding for legal services is cut back and as various restrictions are imposed on the use of the funds that are available. The decision below, which departs sharply from the many federal and state court decisions upholding IOLTA, casts a cloud of uncertainty over IOLTA that can and should be resolved by this Court without further litigation.

This need for resolution brings into play the second prong of the *Yee* test -- "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *See* 503 U.S. at 535. The two additional claims of Respondents come within this second part of the *Yee* test -- they are closely related to, indeed they are dependent on, Respondents' core taking claim; they fall if that core taking claim is rejected as every court had done until the decision below. Accordingly, in the interest of justice and the conservation of scarce judicial and

legal resources, these additional, unpresented claims of Respondents should be considered and rejected along with Respondents' basic taking claim as they were by the First Circuit in *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962 (1st Cir. 1993).

ARGUMENT

I. THE DECISION BELOW IGNORES REALITY AND THE LAW OF TEXAS BY "CREATING" PROPERTY WHEN NONE EXISTS.

Under long-standing ethical rules, lawyers have been required to keep funds held for clients in demand deposit accounts, which are kept separate from the lawyers' own funds. These demand deposit accounts for clients, commonly called "trust funds", did not produce interest for clients because banks did not pay interest on demand deposits. Instead, banks enjoyed the use of the funds and kept the interest produced by the funds.

This situation changed in 1981 when, for the first time, banking regulations permitted payment of interest on demand checking accounts, the so called Negotiated Orders of Withdrawal, or NOW, accounts. But, under the reality of the way banks do business, no interest would be paid on individual client deposits that were nominal in amount or held for such a short time that the banks' charges would exceed the interest. However, if such nominal or short-term deposits for individual clients could be pooled in a lawyer's trust account, they could produce net interest in excess of the bank charges. Realizing this possibility, leaders of the bench and bar developed the concept of the IOLTA program by

which the interest formerly kept by the banks -- and that was never available to clients -- could be shifted from the banks and used to meet the pressing need for funding legal services for the poor. This concept was endorsed by the Conference of Chief Justices and the American Bar Association, and has been adopted by all 50 states and the District of Columbia, usually by order of the jurisdiction's highest court.[3] Thus, the Texas IOLTA program attacked here was created by order of the Supreme Court of Texas pursuant to its authority to regulate the legal profession. The Texas order, which is typical of the orders establishing other IOLTA programs:

> (a) Requires that a lawyer who receives individual "client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" to deposit them "in a separate interest-bearing demand account" (the so-called IOLTA account),[4] and
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> (b) Further provides that such nominal or short-term individual client funds may be deposited in an IOLTA account only if "such funds considered without regard to funds of other clients which may be held by the attorney. . ., could not reasonably be

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[3] An IOLTA program has been approved in Indiana, but is not yet operational.

[4] *Washington Legal Foundation v. Texas Equal Access to Justice Foundation ("Texas Equal Access")*, 94 F.3d 996, 999 (5th Cir. 1996), *reh'g and suggestions for reh'g en banc denied*, 106 F. 3d 640 (5th Cir.), *cert. denied*, 117 S. Ct. 2514 (No. 96-1766), *and cert. granted in part sub. nom. Phillips, et al v. Washington Legal Found., et al*, 117 S. Ct. 2535 (1997) (No. 96-1578).

> expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs, which would be incurred in attempting to obtain interest on such funds for the client." *See Texas Equal Access*, 94 F.3d at 999.

The premise of the IOLTA program thus is to take nominal or short-term funds of individual clients that cannot produce interest separately, and aggregate them in a pooled trust account with like funds of other clients so that they will produce a net amount over bank charges.

The decision by a panel of the court below did not question this basic premise of the IOLTA program, but viewed it as an unsuccessful attempt at "alchemy". *See id.* at 1000. The panel then proceeded to create "something from nothing" itself by asserting that interest "is a two-part process" in which "a property interest attaches the moment interest accrues, from which the bank then deducts its charges from the depositor's account." *Id.* at 1003. The panel did not explain how this assumed "property interest" has any value when it would be offset by the bank charges, as it would be without IOLTA. An individual depositor of nominal or short-term funds could not get his or her "accrued property interest" without paying the bank's charges, which not only consume any interest that might be produced, but may even consume the principal of the deposit itself over time.

Six judges of the court below dissented from the denial of the suggestions for rehearing *en banc* of the panel decision, and four of them filed a dissenting opinion that strongly criticized the panel's decision in almost every respect. 106 F.3d 640 (5th Cir. 1997). In particular, the "two-part process" used by the panel to create a "property interest" was flatly called "simply wrong" (106 F.3d at 643-44):

> The panel attempted to avoid this reality [i.e., that the clients had no property to be taken] by claiming that a bank assigns interest to a depositor in a two-part process. *See Washington Legal Fdn.*, 94 F.3d at 1003. According to the panel, a bank attributes interest to an account prior to deducting any of its fees. *Id.* From this, the court concluded that "a property interest attaches the moment that the interest accrues. . . ." *Id.*

Even if the panel presents an accurate picture of banking practices, however, those practices are beside the point. For purposes of a takings clause challenge, a constitutionally cognizable interest in property does not exist in "earnings" from a deposited fund unless and until those earnings can be distributed as proceeds to the fund's beneficiary. Because IOLTA-eligible funds would never produce interest proceeds, earnings from such funds cannot be distributed to the funds' owners. For this reason, the panel's conclusion that a property interest was created after the first

step in the bank's process of assigning interest is simply wrong.

The panel's two-part process is more than just "simply wrong". In addition to ignoring the reality of banking practices, it fails to give the deference that is due to the order of the Supreme Court of Texas carefully limiting IOLTA deposits to individual client funds which can not "reasonably be expected to earn interest for the client". 94 F.3d at 999. *Cf. Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997).

The panel below may be correct when it says that, under the law of Texas, interest follows principal, but it ignores the law of Texas -- as declared by the order of the Supreme Court of Texas establishing the Texas IOLTA Program -- when it asserts that there is any interest to follow principal. The IOLTA program does not take anything an individual client could earn on his or her nominal or short-term deposits. That reality completely undercuts the decision below.

II. THIS COURT'S TAKING CLAUSE JURISPRUDENCE ESTABLISHES THAT THERE IS NO TAKING UNDER IOLTA.

A taking clause analysis naturally begins with determining whether there is any property to be taken. As the panel below recognized, "State law defines 'property'", *Texas Equal Access*, 94 F.3d at 1000 (citing *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). The panel then proceeded, contrary to the law of Texas, to find property rights to interest in Respondents, even though the Supreme

Court of Texas stated in its order creating its IOLTA program that a client's funds were to be deposited in IOLTA accounts only if "such funds, considered without regard to funds of other clients which may be held by the attorney . . ., could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost[s involved]." *Id.* at 999.

This error of finding a property right that is not recognized by the law of Texas is compounded by the failure of the panel below to conduct a taking analysis under the principles stated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and consistently followed in subsequent cases.[5] Indeed, *Penn Central* was not even mentioned by the panel below. When the *Penn Central* analysis is performed, it is clear that there is no taking by an IOLTA program.

In *Penn Central*, this Court recognized that its prior decisions on the taking clause had been "unable to develop any 'set formula' for determining . . . [what are] essentially ad hoc factual inquiries, [but] the Court's decisions have identified several factors that have particular significance." *Penn Central* at 124. Those factors were explained as "[t]he economic impact . . . on the claimant", interference "with distinct investment-backed expectations" and the "character of the governmental action". *Id.*

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[5] *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986)

When IOLTA is measured against these three factors, there is no taking:

(A) There is no economic impact on the claimants.

IOLTA does not take any client funds; they remain payable to the client on demand. Nor does IOLTA deprive clients of any interest they could individually derive from deposit of their individual nominal or short-term funds. It is irrelevant that the pooled IOLTA accounts do produce funds, for the taking clause is not triggered by someone's gain, but only by someone's loss. *See, United States* v. *General Motors Corp.*, 323 U.S. 373, 378 (1945).

(B) There is no interference with distinct investment-backed expectations:

Before the creation of NOW accounts, clients had no investment-backed expectations because interest was not paid on demand deposits. This was not changed by IOLTA because the nominal or short-term funds of individual clients that are required to be deposited in IOLTA accounts are not capable of producing interest if deposited by the individual. There is simply no realistic basis for any client to have distinct investment-backed expectations regarding deposits of his or her nominal or short-term funds, because any interest will be offset, indeed the principal itself may even be consumed, by bank charges.

(C) The character of the government action.

As *Penn Central* explains, 438 U.S. at 124:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see e.g. United States* v. *Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

IOLTA easily passes under this factor. There is no physical invasion of Respondents' property, and IOLTA is a public program created by the states to promote the common good, *i.e.*, to raise badly needed funds to provide access to justice for the poor.

Instead of undertaking an analysis of the *Penn Central* factors, the court below relied on *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). However, *Webb's* is consistent with *Penn Central* as *Webb's* itself explains. *See* esp. *Webb's*, 449 U.S. at 163-64. In any event, *Webb's* is also easily distinguishable as next discussed.

III. THIS CASE IS NOT GOVERNED BY *WEBB'S FABULOUS PHARMACIES.*

Webb's case has no application to the IOLTA programs. It is factually and analytically distinguishable as

every federal and state court considering the matter consistently found until the panel decision below.[6]

There is simply no comparison between the $1,812,145 deposit which earned interest in excess of $100,000 that was involved in *Webb's* and the nominal or short-term deposits involved in IOLTA that by definition will not produce interest for individual clients. The creditors in *Webb's* had distinct investment-backed expectations and the action of the state in taking the interest in addition to a statutory fee had an adverse economic impact on them. Moreover, the nature of the state action was different in *Webb's*; it was not an effort to adjust "the benefits and burdens of economic life to promote the common good. . . . Rather, the exaction is a forced contribution to general government revenues, and it is not reasonably related to the costs of using the courts." 449 U.S. at 162-63 (citation omitted). Moreover, "[n]o police power justification is offered for the deprivation." *Id.*

This Court was also careful to stress that its decision in *Webb's* was limited to "the narrow circumstances of this case", *id.* at 164, circumstances that have no application to IOLTA as the panel below erroneously assumed. The confusion below is illustrated by the assertion that other courts have found *Webb's* "inapposite because of the

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[6] *See e.g., Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987); *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993); *Carroll v. State Bar*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (Cal. App. 4th Dist.), *cert. denied sub. nom. Chapman v. State Bar of California*, 474 U.S. 848 (1985).

difference in size between the deposit in *Webb's* and the funds eligible for deposit in IOLTA accounts." *Texas Equal Access*, 94 F.3d at 1001. That completely misses the point.

The critical difference is not the size of a deposit but whether it can produce interest. Interest was produced on the large deposit in *Webb's*, but cannot reasonably be expected on the nominal or short-term funds of individual clients subject to IOLTA. The taking clause protects even nominal amounts, but it does not protect the non-existent interest that nominal or short-term deposits of individual clients are unable to produce unless pooled with other client funds in an IOLTA account.

IV. THE MATTERS LEFT OPEN BELOW SHOULD BE RESOLVED BY THIS COURT IN THE INTEREST OF JUSTICE.

The other challenges raised by Respondents against IOLTA -- that were left open below and are not presented by the petition -- should nevertheless be decided by this Court in the interest of justice. Ordinarily, of course, this Court will consider only questions "set out in the petition, or fairly included therein . . .". Sup. Ct. R. 14.1(a). However, this rule is prudential only in cases coming from the federal courts and may be disregarded in "the most exceptional cases. . .where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (citation omitted).

This is one of those "most exceptional cases. . . where reasons of urgency or of economy" justify disregarding the prudential limitation of Rule 14.1(a).

IOLTA is a program of great public importance. Endorsed by the Conference of Chief Justices and the American Bar Association, and adopted in every state and the District of Columbia, it provides badly needed funds for the poor to have access to justice. The interest formerly enjoyed by banks is now used to fund legal service providers who desperately need it to replace the cutbacks in public funds for legal services and the restrictions placed on the use of those public funds.

Despite the innovative and beneficial nature of the IOLTA programs, and their wide acceptance, these programs have been under attack, almost from the beginning, often by Respondent Washington Legal Foundation, in federal and state courts across the nation, from Florida to California and from Massachusetts to Texas, without success until the panel decision below.[7]

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[7] The constitutionality of IOLTA programs has been upheld by the 1st and 11th Circuits. *See Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987), and *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993).

The courts of Arkansas, California, Florida, Massachusetts, Minnesota, New Hampshire, Utah and Washington have also explicitely ruled that IOLTA is constitutional and does not involve any taking of property. *See In the Matter of Interest on Lawyers' Trust Accounts*, 283 Ark. 252, 675 S.W. 2d 355 (1984); *Carroll v. State Bar of California*, 166 Cal. App. 3d 1193, 213 Cal. Rptr. 305 (Cal. App. 4th Dist.), *cert. denied sub nom. Chapman v. State Bar of California*, 474 U.S. 848 (1985); *In re Interest on Trust Accounts*, 402 So.2d 389 (Fla. 1981); *Petition by Massachusetts Bar Ass'n*, 395 Mass. 1, 478 N.E.2d 715 (1985); *Petition of Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *Petition of New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982); *In the Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983); and, *In the Matter of Adoption of Amendments to CPR DR 9 102 IOLTA*, 102 Wash. 2d 1101 (1984).

That panel decision, which sharply departs from all prior holdings, has cast a cloud of uncertainty over IOLTA that should be resolved, once and for all, by this Court for reasons of urgency and economy and in the interest of justice and our proud goal of "equal justice under law".

Having sustained Respondents' taking claim, the panel below did not pass on Respondents' additional claims that the Texas IOLTA program (1) deprived Respondents of the right to exclude others from benefiting from their property and (2) violated their First Amendment rights.

These additional claims are closely related to, indeed they depend upon, Respondents' core claim that their property is being taken against their will. If that core claim is rejected -- as we urge this Court to do, and as every court has done before the decision below -- these additional claims also fall as the First Circuit held in the *Massachusetts Bar Foundation* case. 993 F.2d 962. If there is no property being taken, Respondents have no claim that others are benefitting from their property; likewise Respondents have no First Amendment claim that their property is being used against their will to support causes which they oppose.

Accordingly, for reasons of urgency and economy and in the interest of justice, the Court should consider and

reject these additional claims of Respondents along with their core taking claim.

CONCLUSION

For the reasons stated herein, and in the briefs of Petitioners and other supporting *amici*, the decision below should be reversed and the constitutionality of the IOLTA programs should be upheld.

Respectfully submitted,

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